No. 88-

SEP 28 1988
JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

State of North Carolina,

Petitioner,

v.

Joseph Mario Tarantino,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

WHETHER A LAW ENFORCEMENT OFFICER PEERING THROUGH A CRACK IN A WALL OF AN OLD STORE BUILDING VIOLATED THE FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCH?

TABLE OF CONTENTS

QUESTSION PRESENTED i

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION 2

STATEMENT OF THE CASE 2

REASONS WHY THE WRIT SHOULD ISSUE 5

A. The Supreme Court of North Carolina has decided an important question of Federal Constitutional Law in a manner in conflict with applicable decisions of this Court. 5

B. The Supreme Court of North Carolina has decided an important question of Federal Constitutional law in a manner contrary to that of the Federal Circuit Courts and courts of last resort of other states. 7

CONCLUSION 8

TABLE OF AUTHORITIES

California v. Ciraolo, 476 U.S. 207 (1986). 5

Commonwealth v. Hernley, 216 Pa. Super. 177, 263 A.2d 904 (1970),cert. denied, 401 U.S. 914 (1971) 8

Dow Chemical Co. v. United States, 476 U.S. 227 (1986) 5

Goldman v. United States, 316 U.S. 129 (1941) 5

Katz v. United States, 389 U.S. 347 (1967) 5, 6, 7

Nordskog v. Wainwright, 546 F.2d 69 (5th Cir. 1977) 7

Olmstead v. United States, 277 U.S. 438 (1927) 5

People v. Mercado, 68 N.Y.2d 874, 501 N.E.2d 27 (1986). . . . 8

State v. Tarantino, ___ N.C. ___, 368 S.E.2d 588 (1988) 6

State v. Tarantino, 83 N.C.App. 473, 350 S.E.2d 864 (1986) 4

State v. Thompson, 196 Neb. 55, 241 N.W.2d 511 (1976) 8

Texas v. Brown, 460 U.S. 730 (1983). 7

United States v. Connor, 478 F.2d 1320 (7th Cir. 1973). 8

United States v. Dunn, 480 U.S. ___, 107 S.Ct. 1134, 94 L.Ed.2d 326(1987) 4, 5

United States v. Dunn, 766 F.2d (5th Cir. 1985) 6, 7

United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 947 (1972) 8

STATUTES AND CONSTITUTIONAL AMENDMENTS PRESENTED

Fourth Amendment to the United States Constitution 2

28 U.S.C. Sec. 1257 1

N.C.Gen.Stat. Sec. 15A-979(c) 4

N.C.Gen.Stat. Sec. 7A-30(1) 4

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The Petitioner, State of North Carolina, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of North Carolina entered in this proceeding on June 22, 1988.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at ___ N.C. ___, 368 S.E.2d 588 (1988), and is reproduced in Appendix "A" of this Petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina affirming the suppression of evidence seized from a building owned by the Respondent was entered June 22, 1988.[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec.1257.

[1] The opinion of the Supreme Court of North Carolina was filed on June 2, 1988. In accordance with Rule 32(b) of the North Carolina Rules of Appellate Procedure the actual judgment is not entered until twenty (20) days later. During this twenty (20) day period the opinion may be withdrawn or modified by the Supreme Court of North Carolina.

CONSTITUTIONAL PROVISION

At issue in this case is the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.[2]

STATEMENT OF THE CASE

On August 30, 1985 Detective B.R. Baker of the Avery County, North Carolina Sheriff's Department received a phone call from a citizen of Avery County between eight and nine p.m. This citizen informed Baker that he had been to the "Old Aldridge Store" and by looking through cracks in the walls saw what he thought was marijuana. The caller had given Detective Baker information in the past. None of this past information had ever been substantiated and had resulted in no arrests.

After receiving the phone call Detective Baker continued with an interview he was conducting. Baker concluded the interview and then drove to the Elk Valley community, a rural area of North Carolina, where the "Old Aldridge Store" was located. Detective Baker, a long time resident of Avery County, was familiar with the building and knew it to be the "Old Aldridge Store." In fact Baker had known of the old building since 1976 and, to his knowledge, it had not operated as a store during that time.

Baker described the structure as a two story building covered with light brown fake brick siding. The exterior of the building was unkempt and not well maintained. The windows of the building were boarded over. Woods ran right up to the back of the building.

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[2] No concomitant state constitutional provision was raised by the respondent as a ground for exclusion.

Detective Baker arrived at the old store building at approximately eleven p.m. on August 30, 1985 and parked in a gravel parking area adjacent to the building. After getting out of the car with his flashlight Baker approached the padlocked front door. Baker knocked on the door. Receiving no answer, Baker used his flashlight and followed a path around the right side of the building.

After reaching the rear of the building Detective Baker stepped onto the porch. Baker knocked on one of the two back doors to the building. Receiving no answer Baker began to shine his flashlight through the cracks in the back of the building where a substantial portion of the back wall was uncovered by the absence of the fake brick siding.

Baker, who was approximately one foot away from the back wall, could see into the building by shining his flashlight when he bent or stooped down. The cracks in the back wall of the building varied from one-eighth to one-quarter inch in width and he could see what he believed to be growing marijuana in the building.

Upon observing what he believed to be marijuana Baker left and returned to the Sheriff's Department. Baker prepared a search warrant and presented it to a magistrate under oath. The magistrate issued the search warrant and the ensuing search of the building resulted in the seizure of forty seven growing marijuana plants, nine growing lights, one electric airless sprayer, three five gallon plastic buckets, a book entitled the "Marijuana Growers Guide" and other assorted paraphernalia used to grow marijuana.

On August 31, 1985 an arrest warrant was issued for the Respondent, Joseph Mario Tarantino, alleging the offense of manufacturing marijuana by growing. On January 6, 1986 the Grand Jury of Avery County, North Carolina indicted Tarantino for manufacturing marijuana by growing.

The Respondent filed a Motion to Suppress on April 3, 1986 alleging Detective B.R. Baker of the Avery County Sheriff's Department violated his rights under the Fourth

Amendment by entering onto property owned by Tarantino and looking through a crack in the boards which comprised the back wall of the building. On April 29, 1986, after a full hearing at which all parties presented evidence, the Honorable Marvin K. Gray, judge presiding, entered an order suppressing the evidence seized from the building owned by Tarantino. Judge Gray concluded that Detective Baker's initial visual inspection through the cracks in the outside wall of the interior violated Tarantino's rights under the Fourth Amendment. The State of North Carolina, pursuant to N.C.Gen.Stat. Sec. 15A-979(c), appealed from the granting of Tarantino's Motion to Suppress to the North Carolina Court of Appeals.

On December 16, 1986 the North Carolina Court of Appeals in ***State v. Tarantino***, 83 N.C.App. 473, 350 S.E.2d 864 (1986) affirmed the trial court's ruling suppressing the evidence seized from the building. The State of North Carolina petitioned the Supreme Court of North Carolina for discretionary review on January 20, 1987. On April 9, 1987 the Supreme Court of North Carolina, in 319 N.C. 409, 354 S.E.2d 727 (1987) granted review for the limited purpose of entering an order remanding the case to the North Carolina Court of Appeals for further review in light of this Court's decision in ***United States v. Dunn***, 480 U.S.___ , 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987).

On July 21, 1987 the North Carolina Court of Appeals, in 86 N.C.App. 441, 358 S.E.2d 131 (1987), once again filed an opinion affirming the granting of defendant's Motion to Suppress at the trial level. The State of North Carolina appealed pursuant to N.C.Gen.Stat. Sec. 7A-30(1) and asserted that the case involved a substantial question under the Constitution of the United States. On October 9, 1987 the Supreme Court of North Carolina granted further review. The Supreme Court of North Carolina affirmed the North Carolina Court of Appeals and upheld the trial court's order granting suppression by finding that Tarantino had a "reasonable expectation of privacy" in the building and that Detective Baker's peering through the cracks in the rear wall violated the Fourth Amendment.

REASONS WHY THE WRIT SHOULD ISSUE

A. The Supreme Court of North Carolina has decided an important question of Federal Constitutional Law in a manner in conflict with applicable decisions of this Court.

Prior to the 1967 term of this Court Fourth Amendment rights were not triggered absent "physical penetration." ***Goldman v. United States***, 316 U.S. 129 (1941); ***Olmstead v. United States***, 277 U.S. 438 (1927). During the 1967 term of this Court the aforementioned standard was changed from one requiring physical penetration to a standard which revolved around a person's "reasonable expectation of privacy." ***Katz v. United States***, 389 U.S. 347 (1967). Since that landmark decision this Court has applied, on several occasions, the "reasonable expectation of privacy" standard of ***Katz v. United States, supra***, to visual observations made by law enforcement officers or agents of the government. See, for example, ***United States v. Dunn***, 480 U.S. ___, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987); ***Dow Chemical Co. v. United States***, 476 U.S. 227 (1986); ***California v. Ciraolo***, 476 U.S. 207 (1986).

This Court, in ***United States v. Dunn***, 480 U.S. ___, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), a case factually analogous to the subject in this certiorari petition, addressed two issues. The first issue dealt with the right of the law enforcement officers to their vantage point. Specifically the question related to whether the officers were within the curtilage of the Dunn residence. Once it was decided that the barn, in ***Dunn, supra***, was not within the curtilage this Court went on to decide whether the actual viewing into the interior of the barn, with the aid of a flashlight, violated a privacy interest recognized as reasonable under the Fourth Amendment. The barn, in ***Dunn, supra***, was "composed of brick, metal siding, and large metal sliding doors and was completely enclosed. The front of the barn was partially composed of a wooden wall with windows. The remainder was enclosed by waist-high wood slatting and wooden gates. At the time of Agent Gospodarek's visits..., the top half of the front of the

barn was covered by a fishnet type material from the ceiling down to the top of the locked wooden gates. To see inside the barn it was necessary to stand immediately next to the netting. From as little as a few feet distance, visibility into the barn was obscured by the netting and slatting." ***United States v. Dunn***, 766 F.2d 880, at 883 (5th Cir. 1985).

This Court assumed that the interior of the barn in ***Dunn*** was protected by the Fourth Amendment and that it could not be entered and items seized absent a search warrant or some exigent circumstance. However, the officers, having secured a legitimate vantage point, from the perspective of the Fourth Amendment, could peer through the fishnet netting, with the aid of a flashlight, without invading a reasonable expectation of privacy.

The Supreme Court of North Carolina, viewing a fact situation in this case which is analogous to the facts of ***United States v. Dunn, supra***, reached a result contrary to ***Dunn*** and ***Katz v. United States, supra.***

Unlike this Court in ***Dunn***, the Supreme Court of North Carolina declined to decide whether Detective Baker's entry onto Tarantino's property and eventually the back porch of the building violated the Fourth Amendment. ***State v. Tarantino***, ___N.C. ___, 368 S.E.2d 588, 592 (1988). The Court did consider whether Baker's peering through cracks in the back wall of the old store building violated the Fourth Amendment.

The Supreme Court of North Carolina concluded that Tarantino had a reasonable expectation of privacy in the inside of the building and Officer Baker's looking into the interior of the building violated that reasonable expectation. The Supreme Court found three things that distinguished this matter from ***Dunn, supra***, in a "constitutionally significant way." The first factual difference alluded to was the size of the aperture. The quarter inch cracks in this case and the fishnet netting in ***Dunn, supra***, can be fairly characterized as factual distinctions without meaningful difference. Next, the Court found significant that Detective Baker had to bend or

stoop slightly and use his flashlight to aid him in looking into the building. This Court has noted in the past that an officer using a flashlight to aid his vision and changing position slightly, when he is in a place where he has the right to be, is "irrelevant" for Fourth Amendment analysis. ***Texas v. Brown***, 460 U.S. 730, 769-770 (1983). Finally, the Supreme Court of North Carolina found relevant that there was no evidence to indicate that if Detective Baker had tried to look through the crack in the back wall during daylight hours that he would have been able to see inside. [Petitioner has frankly been unable to divine how this is minimally relevant much less of "constitutional significance."]

Clearly the decision of the Supreme Court of North Carolina is based on distinctions which are meaningless for purposes of the Fourth Amendment. In reaching this conclusion the Court's decision in this case has placed it in direct conflict with the decisions of this Court in ***United States v. Dunn, supra***; Texas v. ***Brown, supra*** and ***Katz v. United States, supra***.

B. The Supreme Court of North Carolina has decided an important question of Federal Constitutional law in a manner contrary to that of the Federal Circuit Courts and courts of last resort of other states.

In addition to being contrary to decisions of this Court the opinion of the Supreme Court of North Carolina is in conflict with a number of decisions of the federal circuits and state courts of last resort.

A number of courts have, under circumstances factually similar to the matter before this Court, upheld police looking into the interior of buildings and even homes. In ***Nordskog v. Wainwright***, 546 F.2d 69 (5th Cir. 1977) police officers followed a set of footprints to the home of the defendant. Peering through the window of the defendant's residence, police observed tennis shoes with a tread pattern similar to the footprints they had been following. The Court held that the viewing by the police into the home was not a

violation of the Fourth Amendment. ***United States v. Connor,*** 478 F. 2d 1320 (7th Cir. 1973) is a decision based upon similar facts in which the Court found there was no Fourth Amendment violation. In ***Connor*** an officer's visual surveillance from the concrete apron adjacent to the rear of the defendant's business into the interior was held not to be violative of the Fourth Amendment. The case which is factually closest to the matter before this Court is ***United States v. Wright***, 449 F. 2d 1355 (D.C. Cir. 1971), cert. denied, 405 U.S. 947 (1972). In ***Wright***, police peered through a crack in a garage door and used a flashlight to aid their vision into the interior. The Court held there was no Fourth Amendment violation.

A variety of state courts of last resort have under analogous facts, also rendered opinions contrary to the opinion of the Supreme Court of North Carolina in this case. In ***People v. Mercado***, 68 N.Y. 2d 874, 501 N.E. 2d 27 (1986) an airport authority officer was deemed not to have violated the Fourth Amendment by looking through spaces at the side of a bathroom stall door and then entering the adjoining stall and looking over the partition. In ***State v. Thompson***, 196 Neb. 55, 241 N.W. 2d 511 (1976) police, from an alley adjoining the defendant's house, used binoculars to view through the drawn sheer curtains of the house. The Court, in ***Thompson***, concluded the viewing did not violate the Fourth Amendment. In ***Commonwealth v. Hernley***, 216 Pa. Super. 177, 263A. 2d 904 (1970), cert. denied, 401 U.S. 914 (1971) an F.B.I. agent placed a ladder on a railroad right-of-way and used binoculars to look into a printshop window and observe football gambling forms being printed. The Court held that no Fourth Amendment violation had taken place.

CONCLUSION

It is of paramount importance that the judiciary set forth bright line rules which can be practically applied by law enforcement and which promote and further the objectives of the Bill of Rights. The Supreme Court of North Carolina, by its decision in this matter, has set forth principles of law which are hypertechnical, unworkable for law enforcement and do nothing to further the objectives of the Fourth Amendment.

Indeed, the decision of the Supreme Court of North Carolina is devoid of any practical wisdom or guidance and instead expressly condemned the inherently reasonable action of the officer in attempting to verify the information imparted by an unproven citizen informant prior to the issuance of a search warrant. The directive of the Supreme Court of North Carolina is contradictory to the often cited principle that law enforcement officers should be encouraged and indeed praised for attempting to verify informant information prior to the physical intrusion of a search warrant. The practical consequence of a decision, such as the one in this case, is to promote physical intrusion over unobtrusive visual verification. Such a decision can in no way be seen as furthering the objectives of the Fourth Amendment.

Because the decision of the Supreme Court of North Carolina is based on an erroneous perception of Federal Constitutional law, does nothing to further the objectives of the Fourth Amendment and is in conflict with decisions of this Court, the federal circuit courts of appeal and a number of state appellate courts of last resort, the State of North Carolina respectfully prays that a Writ of Certiorari should issue to review the judgment of the Supreme Court of North Carolina herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an Assistant Attorney General for the State of North Carolina, and that I have served copies of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA by depositing same in the United States mail at Raleigh, North Carolina, first class postage prepaid, to:

Mr. Thomas K.Maher
Beskind & Rudoff, P.A.
312 W. Franklin Street
Chapel Hill, North Carolina 27514

This the day 28th of September 1988.

_____

John H. Watters
Assistant Attorney General
Attorney for Petitioner

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APPENDIX

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TABLE OF CONTENTS

APPENDICES

A. Opinion of the North Carolina Supreme Court filed June 2, 1988 STATE v. TARANTINO A-1

APPENDIX A

SUPREME COURT OF NORTH CAROLINA

No. 30PA87 - Avery
[Filed June 2, 1988]

STATE OF NORTH CAROLINA

v.

JOSEPH MARIO TARANTINO

On discretionary review of a decision of the Court of Appeals, 86 N.C. App. 441, 358 S.E.2d 131 (1987), affirming an order entered by Gray, J., presiding at the 7 April 1986 Mixed Session of Superior Court, Avery County, granting defendant's motion to suppress evidence seized by a law enforcement officer from a building defendant owned. Heard in the Supreme Court 11 February1988.

Lacy H. Thornburg, Attorney General, by JOHN H. WATTERS, Assistant Attorney General, for the state.

Beskind and Rudolf, P.A. by THOMAS K. MAHER for defendant appellee.

EXUM, Chief Justice.

The sole issue this case presents is whether, in light of the United States Supreme Court's decision in ***Dunn v. United States,*** 480 U.S. ___, 94 L.Ed. 2d 326 (1987), the Court of Appeals correctly upheld the trial court's decision to grant defendant's motion to suppress evidence seized from his building because the information furnishing probable cause for the search warrant was obtained in violation of the fourth amendment of the United States Constitution. We answer yes, and affirm the Court of Appeals.

I.

On 10 April 1986 Judge Gray conducted a hearing on defendant's motion to suppress evidence seized from a building he owned. After the hearing, he made findings of fact to which neither the state nor defendant except. He found that on 30 August 1985 B. R. Baker, Jr., a detective in the Avery County Sheriff's Department, received a telephone call from a confidential informant who said he had seen marijuana plants growing on the second floor of the old "Aldridge Store Building." The caller informed DetectiveBaker that the plants could be observed by looking through cracks in the building's back wall. Detective Baker concluded he lacked probable cause to obtain a search warrant because he knew the caller to be unreliable. At approximately 11 p.m. he went to the building, without a warrant, to investigate the caller's claims.

The building which Detective Baker investigated was a two-story frame structure built into a hillside. It was in poor repair when he made his inspection. The windows were boarded from the inside, the solid-wood front door was padlocked, and the back doors -- one solid and the other with a paneless window covered by wood -- were nailed shut. The back doors opened directly to the building's second floor from a porch which had a large open entrance. At the bottom of the wall between the porch doors were several cracks where the wooden boards did not join completely. These cracks were no more than one-quarter of an inch wide.

Detective Baker began his investigation by knocking on the front door. He then climbed the hill to the second-story porch, using a flashlight to guide his way along a little-used path. He entered the porch and knocked on one of the doors inside. Receiving no answer, he searched the back wall until he found cracks in the wall between the doors. By manuevering his body and shining his flashlight through the cracks, Detective Baker illuminated a small part of the building's interior and saw marijuana plants. He returned to the Avery County Sheriff's Department, executed an affidavit, obtained

a search warrant from a magistrate, returned to the premises and seized the marijuana.

After making these findings, Judge Gray concluded, as a matter of law, that Detective Baker's first inspection of the building constituted a warrantless search in violation of the Fourth Amendment. He determined defendant had a reasonable expectation of privacy in the premises searched. He further adjudged that the search fell within no exception to the Fourth Amendment's requirement of a valid warrant. On the basis of his factual findings and legal conclusions, Judge Gray granted defendant's motion to suppress.

The Court of Appeals affirmed Judge Gray's decision. ***State v. Tarantino***, 83 N.C. App. 473, 350 S.E.2d 864 (1986). Subsequently, the United States Supreme Court decided ***United States v. Dunn***, 480 U.S ___, 94 L. Ed. 2d 326. The state petitioned for discretionary review in light of the **Dunn** decision. We granted the state's petition and remanded the case to the Court ofAppeals for further consideration in light of **Dunn.** The Court of Appeals reaffirmed its previous decision, holding that the facts in the present case and those in **Dunn** are sufficiently distinguishable such that **Dunn**'s holding does not require a different result. ***State v. Tarantino***, 86 N.C. App. at 442, 358 S.E.2d at 132.

II.

In **Dunn** the United States Supreme Court held that Drug Administration Enforcement agents did not violate the Fourth Amendment when they peered into the "essentially open front" of the defendant's barn and saw what they thought to be a drug laboratory. ***United States v. Dunn***, 480 U.S. at ___, 94 L. Ed. 2d at 334. The agents made their observation-sat night after crossing several fences encircling the barn, which was located about 60 yards from the defendant's ranch house residence. A locked wooden fence with a waist-high gate barred the agents from entering the barn. The barn's front section was open, covered only by netting material stretching from the barn's ceiling to the gate's top. By standing next to the netting and shining flashlights inside the barn, the agents acquired sufficient information to obtain a search warrant.

Pursuant to the warrant, the agents seized chemicals and equipment and arrested the defendant. **Id.** at ___, 94 L. Ed. 2d at 332-34.

The primary issue confronting the Court in **Dunn**, as the Court of Appeals noted in its opinion below, was whether the agents' search violated the defendant's Fourth Amendment rights because the barn lay within the curtilage of his home. The Court held the barn did not lie within the house's curtilage, applying a four-part test drawn from prior cases. **Id.** at ___, 94 L. Ed. 2d at 334. However one might view the Court's determination of the curtilage question in **Dunn,** it has no bearing in the instant case, for no curtilage question is here presented.

The second issue addressed in **Dunn** was whether the defendant possessed a reasonable expectation of privacy, independent from his home's curtilage, in the barn and its contents. The Court assumed, for argument's sake, that the barn itself could not be entered or its contents seized without a warrant, but went on to hold that the officers properly peered into its interior over the front gate. It reasoned, on the basis of its resolution of the curtilage question, that the officers lawfully approached and stood next to the barn because the land surrounding it was a constitutionally unprotected "open field." From this vantage point the officers rightfully used flashlights to peer through the netting material covering the barn's opening. The Court held "the officers' use of the beam of a flashlight, directed through the essentially open front of [the defendant's] barn, did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment." ***United States v. Dunn***, 480 U.S. at ___, 94 L. Ed. 2d at 337. In so holding the Court drew support from its recent decision in California v. Ciraolo in which it stated "the Fourth Amendment 'has never been extended to require law enforcement officers to shield their eyes when passing by a home on a public thoroughfare." **Id.** at ___, 94 L.Ed. 2d at 337 (quoting ***California v. Ciraolo***, 476 U.S. 207, 213, 90 L. Ed. 2d 210, 216 (1986)).

The **Dunn** decision, as the Court of Appeals correctly noted, does not alter the rule that the Fourth Amendment applies if a person exhibits a subjective expectation of privacy in the object of the challenged search, and that, expectation is one which society is prepared to recognize as reasonable. ***O'Conner v. Ortega***, 480 U.S. ___, 90 L. Ed. 2d 714, 722 (1987); ***California v. Ciraolo***, 476 U.S. at 211, 90 L. Ed. 2d at 215; ***Smith v. Maryland***, 442 U.S. 735, 740, 61 L. Ed. 2d 220, 226-27 (1979). The Fourth Amendment applies to nonresidential buildings to the extent they are not exposed to the public. ***Marshall v. Barlow's, Inc.***, 436 U.S. 307, 311, 56 L. Ed. 2d, 305, 310 (1978); ***United States v. Katz***, 389 U.S. 347, 351-52, 19 L. Ed. 2d 576, 582 (1967).

Consistent with this traditional approach, the Court in **Dunn** did not end its analysis by concluding the officers were in an open field when they made their observations; rather, it proceeded to examine the nature of the opening through which they made their observations to determine if this negated any reasonable expectation of privacy in the building's interior. Because the barn's interior was exposed to the public from an unprotected vantage point, the Court held that the officers' inspection was not a Fourth Amendment violation. ***United States v. Dunn***, 480 U.S. at ___, 94 L. Ed. 2d at 337.

Applying traditional Fourth Amendment analysis to the instant case, we agree with the Court of Appeals that the trial court correctly concluded defendant had a reasonable expectation of privacy in the building which Detective Baker inspected. The building's padlocked front door, nailed back doors, and boarded windows indicate that defendant had a subjective expectation of privacy in his building's interior. This expectation was not unreasonable even though there were small cracks between the boards in the building's back wall. The presence of tiny cracks near the floor on the interior wall of a second-floor porch is not the kind of exposure which serves to eliminate a reasonable expectation of privacy. To hold otherwise would result in an unfairly exacting standard. It would require owners of nonresidential buildings who want to enjoy their Fourth Amendment rights to maintain their

structures almost as airtight containers. The Supreme Court has never imposed such a standard, and we decline to do so in this case.

Nothing in the Supreme Court's **Dunn** decision suggests that an expectation of privacy is eliminated by quarter-inch cracks in the back wall of an otherwise sealed building. The inquiry in, **Dunn** centered on the Fourth Amendment's requirements when law enforcement officials are faced with an open barn front obstructed only with see-through netting. The barn's interior was fully exposed to anyone standing next to the netting. ***United States v. Dunn***, 480 U.S. at ___, 94 L. Ed. 2d at 338 (Brennan, J., dissenting). Under these circumstances the Court declared it would not require the officers to "shield their eyes" from that which was exposed to public view. Id. at ___, 94 L. Ed. 2d at 337.

By contrast, in the instant case, Detective Baker confronted a nearly solid wall when he entered defendant's porch. Boarded windows and nailed doors prohibited observation of the inside from all but the most rigorous scrutiny. To make his observations, Detective Baker had to bend and peer with a flashlight through quarter-inch cracks near the floor. Nothing indicates, as in **Dunn,** that had Detective Baker conducted his investigation during the day he could have viewed the building's interior without making the same searching inquiry. These facts distinguish this case from **Dunn** in a constitutionally significant way. Far from demanding Detective Baker to avert his eyes to avoid viewing the building's interior, the cracks near the porch floor required him to make a probing examination in order to see inside. Under these circumstances defendant's reasonable expectation of privacy remained intact[1]

The reasonableness of defendant's expectation of privacy was not eliminated because the building's exterior evidenced a degree of neglect when Detective Baker made his observations. The Fourth Amendment's application to a

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[1] Defendant argues that it was unlawful for Detective Baker to enter the porch without a warrant. We decline to assess this contention's merit. Assuming, arguendo, that Detective Baker rightfully entered the porch, his subsequent action of peering into the building's interior was an impermissible warrantless search.

evidenced a degree of neglect when Detective Baker made his observations. The Fourth Amendment's application to a non-residential building's interior is not diminished because its exterior reflects poor maintenance. See ***United States v. Burnette***, 648 F.2d 1038, 1047 (9th Cir. 1983). On the contrary, the Fourth Amendment applies fully so long as the interior is not exposed to the public. ***Marshall v. Barlow's Inc.***, 436 U.S. at 311, 56 L. Ed. 2d at 310; ***United States v. Katz***, 389 U.S. at 351-52, 19 L. Ed. 2d at 582. Because defendant did not expose the interior of his building to the public, the Fourth Amendment applied with full force.

Our decision is consistent with those of other jurisdictions. In ***Bradshaw v. United States***, the Fourth Circuit held that the defendant's reasonable expectation of privacy in his truck's interior was not eliminated by the presence of a crack where the back doors did not fit snugly. 490 F.2d 1097, 1101 (4thCir.) **cert. denied**, 419 U.S. 895 (1974) The court concluded that police officers violated the Fourth Amendment when they looked through the crack without a warrant, saw moonshine whiskey jugs, and seized them. The court acknowledged that the officers had a right to approach and stand next to the truck, but it concluded they went beyond lawful investigation when peering through the small space. **Id.** In ***State v. Kaaheena***, the Hawaii Supreme Court concluded the defendant's Fourth Amendment rights were violated when the police stood on a crate and looked through a one-inch hole in the drapes and blinds of a building which housed a"commercial establishment and some rental appartments." 575 P.2d 462, 466 (1978). Although the police made their observations from a public vantage point, the court held that the search was impermissible because the defendant maintained his reasonable expectation of privacy in the building's interior. **Id.** at 467; ***see*** **also** ***Kroehler v. Scott***, 391 F. Supp 1114 (E.D. Pa. 1975) (violation of Fourth Amendment for officers to peer through small ceiling vents); ***Lorenzana v. Superior Court of Los Angeles County***, 9 Cal. 3d, 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973) (officers violated Fourth Amendment by peering through drawn curtains); ***People v. Triggs,*** 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973) (illegal search where officers in maintenance access area peered through

vents); ***People v. Lovelace***, 172 Cal. Rptr. 65, 116 Cal. App. 3d 541 (1981) (reasonable expectation of privacy not eliminated by knotholes and cracks in six foot high wooden fence); ***State v. Biggar***, 716 P.2d 493 (1986) (reasonable expectation of privacy not eliminated by crack one half to one inch wide where toilet stall door did not close properly).

In conclusion, we agree with the Court of Appeals that the decision by the Supreme Court in United States v. Dunn does not require a reversal of the trial court's decision to grant defendant's motion to suppress evidence taken from his building. Both the trial court and the Court of Appeals reached the right result on the search issue for the right reasons. The decision below, therefor[illegible]s

AFFIRMED.

No. 30PA87 - State v. Tarantino

Justice Mitchell dissenting.

The defendant has at no time contended in the present case that any step in either the search for or the seizure of his marijuana violated any provision of the Constitution of North Carolina or any statute. Instead, the defendant raises only the federal question of whether the trial court was required to suppress the evidence concerning the marijuana seized from his building, because probable cause for the search warrant was obtained in violation of the Fourth Amendment to the Constitution of the United States.

The majority relies upon the decision of the Supreme Court of the ***United States in Dunn v. United States***, 480 U.S., 94 L.Ed. 2d326 (1987) in resolving the Fourth Amendment question presented here. I am convinced that the principles stated and applied in **Dunn** do not require exclusion of evidence concerning the marijuana seized in the present case. Therefore, I dissent.

I begin by assuming in the present case, as the Supreme Court assumed in **Dunn**, that the building in which

the contraband was located was protected by the Fourth Amendment. 480 U.S. at ___, 94 L.Ed. 2d at 337. However, I believe that any expectation of privacy the defendant may have had in the present case was much less "reasonable" than that of the defendant in **Dunn.**

It is true that in **Dunn**, the Supreme Court held for purposes of Fourth Amendment search and seizure analysis that the barn lay outside the curtilage of the defendant's home. **But** ***cf. State v. Frizzelle***, 243 N.C. 49, 51, 80 S.E.2d 725, 726 (1955) (applying State common law); ***State v. Browning***, 28 N.C.App. 376, 379, 221 S.E.2d 375, 377 (1976) (same). However, the evidence in **Dunn** revealed that the barn was a part of the same small Texas ranch on which the defendant's residence was located and was only sixty yards from the residence. The residence and barn

> are located in a clearing surrounded by woods, one-half mile from a road, down a chained, locked driveway. Neither the farmhouse nor its outbuildings are visible from the public road or from the fence that encircles the entire property. Once inside this perimeter fence, it is necessary to cross at least one more"substantial" fence before approaching Dunn's farmhouse or either of his two barns.

United States v. Dunn, 480 U.S. at ___, 94 L. Ed. 2d at 338 (Brennan, J., dissenting). The front of the barn involved in **Dunn** was enclosed by a wooden fence. The back and sides of the barn

> "were composed of brick, metal siding, and large metal sliding doors and were completely enclosed. The front of the barn was partially composed of a wooden wall with windows. The remainder was enclosed by waste-high wood slatting and wooden gates. At the time of [the] agent['s] visits . . ., the top half of the front of the barn was covered by a fishnet type material from the ceiling down to the top of

> the locked wooden gates. To see inside the barn it was necessary to stand immediately next to the netting [under the barn's overhang]. From as little as a few feet distant, visibility into the barn was obscured by the netting and slatting." 766 F.2d 880, 883 (CA5 1985).

Id.

Since the barn and adjacent barnyard in **Dunn** were held to be outside the curtilage, the Supreme Court concluded that the officers had observed the interior of the barn from an open field not protected by the Fourth Amendment. Although the officers in **Dunn** could not see inside the barn -- assumed to be protected by the Fourth Amendment -- until they went under the eaves and stood immediately next to the netting used to cover the only open portion, the Supreme Court concluded that no unreasonable search was involved.

The Supreme Court has held that:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . .But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz v. United States, 389 U.S. 347, 351-52, 19 L.Ed. 2d 576, 582 (1967). On the facts of **Dunn**, the Supreme Court indicated that the defendant had not sufficiently sought to preserve his privacy interest in his barn and the immediately adjacent area because he "did little to protect the barn area from observation by those standing in the open fields." ***United States v. Dunn***, 480 U.S. at ___, 94 L.Ed. 2d at 336.

Any expectation of privacy the defendant in the present case may have had in the closed country-store build-

ing was, by any objective test, much less "reasonable" than the defendant's expectation of privacy in **Dunn.** In **Dunn** the barn was only sixty yards from the defendant's residence. The closed country-store in the present case was not near any dwelling house and was the only structure on the property. In **Dunn** the defendant took extensive steps to ensure his privacy by blocking his driveway with a chainand lock located approximately one-half mile from the barn, fencing the perimeter of his property, fencing the barn itself, and shielding the only open part of the barn with a locked gate and netting material. The defendant in the present case erected no barriers on his property, but simply placed a large quantity of marijuana in the old empty store and closed the door. In **Dunn** the officers were required to walk a great distance from the road and climb perimeter and interior fences before they could position themselves under the eaves of the barn and close enough to see through the netting material into the interior. Here, the investigating officer merely had to walk a relatively short distance up an unobstructed path and step onto the essentially open back porch of the old store building. In order to see into the building, he had merely to stoop or bend at the waist and look through one of the open spots in the rear of the building.

I am convinced that **Dunn** did more to protect his barn from observation than was done by the defendant here, and Dunn's expectation of privacy was far more reasonable than any expectation of privacy this defendant may have had. I certainly am convinced that any distinction between this case and **Dunn** on the ground that the officer here had to bend at the waist to see through an open slit in the wall, while in **Dunn** the officers had to go under the eaves of the barn and position themselves close enough to peek through Dunn's netting material, could not be reasonably viewed as a distinction favorable to this defendant. If we are to follow **Dunn** in resolving the purely federal question presented, I believe we must hold that the information obtained by looking through the back of the building was not obtained in violation of the Fourth Amendment, and it properly provided probable cause for the issuance of the search warrant. Accordingly, I dissent.

No. 88-541

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

State of North Carolina,

Petitioner,

v.

Joseph Mario Tarantino,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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TABLE OF CONTENTS

REASONS WHY THE WRIT SHOULD NOT ISSUE ...1

A. The State's Petition Is Untimely..1

B. The Decision Of The North Carolina Supreme Court Is Consistent With The Decision In United States v. Dunn.....3

C. The Decision Of The North Carolina Supreme Court Is Consistent With The Decisions Of Other Courts.....8

CONCLUSION.....11

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Bradshaw v. United States, 490 F.29 1097, 1101 (4th Cir.), *cert. denied*, 419 U.S. 895 (1974).....9

Commonwealth v. Lemanski, 529 A.2d 1085 (Pa. Super. 1987).....11

Katz v. United States, 389 U.S. 347 (1967).....4

Kroehler v. Scott, 391 F. Supp. 1114 (E.D. Pa. 1975).....9

Lorenzana v. Superior Court of Los Angeles County, 9 Cal.3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973).....9

Oliver v. United States, 466 U.S. 170 (1984).....6

People v. Lovelace, 172 Cal. Rptr. 65, 116 Cal. App.3d 541 (1981).....9

People v. Triggs, 8 Cal.3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973)....9

Riley v. State, 511 So.2d 282, 286 (Fla.1987).....10

State v. Biggar, 716 P.2d 493 (Hawaii 1986).....10

State v. Kaaheena, 575 P.2d 462 (Hawaii1978).....10

State v. Waldschmidt, 12 Ka.2d 284, 740 P.2d 617 (1987).....10

United States v. Dunn, 480 U.S. ___, 107 S.Ct. 1134 (1987).....3,4,7,8,10,11

Wheeler v. State, 659 S.W.2d 381 (Tex. Cr. App. 1983).....10

Sup. Ct. R. 20(1).....2

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REASONS WHY THE WRIT SHOULD NOT ISSUE

A. The State's Petition Is Untimely.

The opinion of the North Carolina Supreme Court was issued on June 2, 1988. Under North Carolina law, the mandate does

not issue for a period of twenty days. Assuming that the time for filing a Petition for a Writ of Certiorari does not begin to run until June 22, the time expired on August 22, 1988. See Sup. Ct. R. 20(1).

The Petition was not filed until September 28, 1988, over a month beyond the time permitted. The State offers no justification for submitting an untimely petition. Equally egregious, the State fails to mention in its Petition that it sought an extension of time that would have allowed it until August 31, 1988 to file the Petition, which was denied.

The State's cavalier disregard for the rules of this Court, and for the order of this Court denying an extension of time within which to file the Petition, justifies denial of the Petition.

B. The Decision Of The North Carolina Supreme Court Is Consistent With The Decision In ***United States v. Dunn***.

The issue presented to the North Carolina Supreme Court was whether, in light of ***United States v. Dunn***, 480 U.S. ___, 107 S.Ct. 1134 (1987), the owner of a non-residential building loses all reasonable expectation of privacy in the interior of that building because of the existence of a quarter-inch crack in the base of a wall between an enclosed porch and the next room. The North Carolina Supreme Court correctly rejected the State's argument that any opening, regardless of its size and location, negates all reasonable expectation of privacy in the interior of the building.

As it argued before the North Carolina Supreme Court, the State argues here that ***Dunn*** altered the mode of analyzing whether an expectation of privacy is

reasonable. ***Dunn***, however, did not alter the mode of determining the existence of a reasonable expectation of privacy. Rather, ***Dunn*** applied the well-established rule that what is in open view is not protected, and determined that the "essentially open" front of Dunn's barn eliminated any reasonable expectation of privacy from visual inspection. This analysis is consistent with the analysis followed since ***Katz v. United States***, 389 U.S. 347 (1967). ***Dunn*** did not adopt the position now espoused by the State that all analysis ends when one determines that the officer did not physically invade a protected area. [The State also ignores the fact that the officer here did enter Mr. Tarantino's building, without a warrant and based upon information he considered to be unreliable].

The State's argument rests upon its claim that the "essentially open" front of a barn is the same as a minute crack in a wall between an enclosed back porch and an interior room. This analogy simply does not work.

The steps taken by Mr. Dunn to secure the interior of his barn from visual inspection are a far cry from the steps taken by Mr. Tarantino. As the North Carolina Supreme Court observed, Mr. Tarantino locked and nailed shut his doors, and covered all of the windows. The only opening through which the interior of Mr. Tarantino's building could be viewed was a small crack in the rear of the building, inside the enclosed porch. Indeed, the crack itself was barely noticeable, and could only be peered through by someone crouching down and placing their face against the wall. In

addition, the building was in a remote area, unlikely to be visited by curious passers-by.

Mr. Dunn, in contrast, had a barn with an open front. He took only two steps to protect the privacy of the interior of the building; he placed fences around the land, and he draped fish-net over the opening. The first of these was simply designed to keep people from entering the land, and was therefore legally insufficient to create a reasonable expectation of privacy. ***See Oliver v. United States***, 466 U.S. 170 (1984) (holding that land surrounded by fences, and posted with no trespassing signs, is still an "open field" for fourth amendment purposes).

The second step was plainly inadequate, as anyone standing outside the barn could see through the fish-net. The State's attempt to equate the fish-net

with the crack in Mr. Tarantino's rear wall based upon the fact that the officers in *Dunn* stood near the fish-netting to see inside, is without merit. The State fails to mention that the search of Dunn's barn occurred at night, and that one would have to stand near the barn whether or not the fish-net was present. Had the officers been present during the day, they could have seen through the fish-net with little more trouble than looking through an open window. An open barn, covered only with fish-net, is simply not the same as a boarded-up building which can only be viewed through tiny cracks.

The North Carolina Supreme Court correctly recognized that this Court's analysis of Dunn's expectation of privacy in his open barn was based upon the application of established law to the facts of the case. The Court's decision that the

existence of a tiny crack does not negate all reasonable expectation of privacy is correct.

C. The Decision Of The North Carolina Supreme Court Is Consistent With The Decisions Of Other Courts.

The State argues that the decision here is inconsistent with decisions from other federal and state courts. Strangely, although the only issue decided by the North Carolina Supreme Court was whether *Dunn* eliminated any reasonable expectation of privacy in this case, the State does not cite a single post-*Dunn* decision. Contrary to the State's assertion, decisions prior to and following *Dunn* have recognized reasonable expectations of privacy in similar situations.

As observed by the North Carolina Supreme Court, decisions have consistently condemned the invasion of privacy inherent in this type of police activity. *See*

Bradshaw v. United States, 490 F.29 1097, 1101 (4th Cir.), *cert. denied*, 419 U.S. 895 (1974) (reasonable expectation of privacy not eliminated by presence of crack where truck's doors did not fit snugly); ***Kroehler v. Scott***, 391 F. Supp. 1114 (E.D. Pa. 1975) (violation of Fourth Amendment for officers to peer through small ceiling vents); ***Lorenzana v. Superior Court of Los Angeles County***, 9 Cal.3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973) (officers violated Fourth Amendment by peering through drawn curtains); ***People v. Triggs***, 8 Cal.3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973) (illegal search where officers in maintenance access area peered through vents); ***People v. Lovelace***, 172 Cal. Rptr. 65, 116 Cal. App.3d 541 (1981) (reasonable expectation of privacy not eliminated by knotholes and cracks in six foot high wooden

fence); *State v. Biggar*, 716 P.2d 493 (Hawaii 1986) (reasonable expectation of privacy not eliminated by crack one-half to one inch wide where toilet stall door did not close properly); *Wheeler v. State*, 659 S.W.2d 381 (Tex. Cr. App. 1983) (officers violated Fourth Amendment in viewing interior of opaque greenhouse through open vents); *State v. Kaaheena*, 575 P.2d 462 (Hawaii 1978) (peering through one-inch gap in blinds covering window violates Fourth Amendment).

The post-*Dunn* decisions of other courts are consistent with this line of decisions, and with the decision of the North Carolina Supreme Court in this case. *See Riley v. State*, 511 So.2d 282, 286 (Fla. 1987) (missing panels in opaque greenhouse did not negate reasonable expectation of privacy); *State v. Waldschmidt*, 12 Ka.2d 284, 740 P.2d 617

(1987) (search conducted by climbing adjoining fence and peering into yard violated Fourth Amendment); *Commonwealth v. Lemanski*, 529 A.2d 1085 (Pa. Super. 1987) (viewing interior of greenhouse, from public vantage point, violated Fourth Amendment).

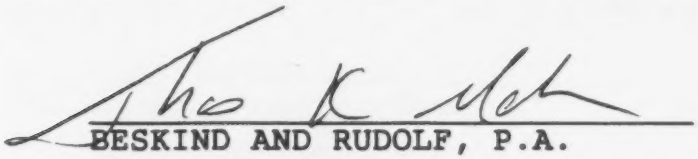
The decision below is consistent with decisions from other courts, both pre- and post-*Dunn*, and the writ should not issue.

CONCLUSION

The decision of the North Carolina Supreme Court is soundly based upon well established principles, and it properly enforces the Fourth Amendment's mandate that a citizen's privacy not be unreasonably infringed. There is no legitimate need to have police officers, acting upon the basis of unreliable information, entering private property and seeking out

any opening, no matter how small, through which to view the interior of a private building. Respondent respectfully prays that the Petition be denied.

This the 28th day of October, 1988.



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this document in the above-captioned action upon all other parties to this cause by depositing a copy hereof, postage prepaid, in the United States Mail, properly addressed to the attorney for each party, as follows:

Mr. John H. Watters
Assistant Attorney General
North Carolina Dept. of Justice
Post Office Box 629
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This the 28th day of October, 1988.

Thomas K. Maher
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85-060.P01